

**IN THE HIGH COURT OF SINDH AT KARACHI**

Suit No. 1743 of 2009

Present :

Mr. Justice Nadeem Akhtar

Date of hearing : 01.11.2012.

Plaintiff : Tayyab Rafiq Balagamwala through  
Mr. Muhammad Shahzad Ashraf, Advocate.

Defendant : Flying Cement Company Ltd. called absent.

**J U D G M E N T**

**Nadeem Akhtar, J.-** This Suit was filed by the plaintiff against the defendant on 08.12.2009 under Order XXXVII Rules 1 and 2 CPC for recovery of Rs.19,230,400.00. The plaintiff is the proprietor of M/S Global Commodities, and is engaged in the business of general trading, import and export of commodities. The primary business of the plaintiff is the commercial import of coal from Indonesia, China and South Africa. The defendant is a limited company incorporated in Pakistan and is engaged in the business of manufacturing, producing and supplying of cement.

2. It is the case of the plaintiff that, through an email dated 05.09.2009, the defendant placed / confirmed an order with the plaintiff for supply of 3,500 metric tons of coal of Indonesian origin at the rate of Rs.6,905.00 plus 16% sales tax. Accordingly, a quantity of 3,498.98 metric tons of coal was supplied by the plaintiff to the defendant on credit. The entire said quantity of coal was delivered by the plaintiff between 08.09.2009 and 27.09.2009 to M/S EL-FRICO Clearing and Forwarding Agents through 51 trucks of Al-Furqan Transport Company, hired by the defendant. Thereafter, the plaintiff sent a Sale Invoice bearing No.095 dated 16.10.2009 for Rs.28,026,130.00 to the defendant in respect of the agreed sale consideration of the aforementioned quantity of coal supplied by the plaintiff. It is also the case of the plaintiff that, in partial satisfaction of its liability, the defendant delivered to the plaintiff one pay order for Rs.3,200,000.00 and six (06) post-dated cheques for total amount of Rs.19,230,400.00. The defendant also promised to issue additional cheques for the

remaining amount of Rs.5,595,730.00 in favour of the plaintiff in full and final settlement of the plaintiff's claim.

3. The plaintiff has alleged that only the amount of Rs.3,200,000.00 was received by him through the pay order delivered to him by the defendant, whereas all the six (06) cheques issued by the defendant were dishonoured upon presentation by the drawee bank. All the said six (06) cheques were presented by the plaintiff several times, but on all occasions the same were returned / dishonoured with the remarks "*not arranged for*". The plaintiff has submitted that several protests and reminders were sent by him to the defendant through emails, which were not only acknowledged by the defendant, but the defendant through its email dated 07.10.2009 also gave a schedule with specific dates for repayment, and further by letter dated 14.10.2009 undertook to pay markup to the plaintiff at the rate of 17% per annum on the outstanding amount till final settlement of the plaintiff's claim.

4. Mr. Muhammad Shahzad Ashraf, learned counsel for the plaintiff, highlighted the above facts and also referred to all the relevant documents filed by the plaintiff in support of his claim. He specifically referred to the purchase order confirmed by the defendant, letter issued by the Clearing and Forwarding Agents confirming receipt of the quantity of coal and the dates on which it was supplied by the plaintiff, the sale invoice issued by the plaintiff, all the dishonoured cheques and their 'cheque return slips' showing reasons for dishonour, protests, reminders and the legal notice by the plaintiff, and defendant's admission of liability and promise to settle the same along with markup. The learned counsel submitted that the defendant has committed a deliberate and wilful breach of the contract, and despite several promises to settle the outstanding liability, the defendant has not fulfilled such promises. He urged that the plaintiff is entitled for the amount claimed in this Suit as the plaintiff performed his agreed part of the contract and there was no breach or default on his part.

5. During the course of hearing, the learned counsel submitted that a sum of Rs.3,200,000.00 was paid by the defendant against cheque No.1219889, whereafter the said cheque was returned by the plaintiff to the defendant. He pointed out that the above payment was made by the defendant after filing of this Suit and that the

defendant has been deliberately avoiding to appear before the Court, although he is fully aware of the filing of this Suit. The learned counsel further submitted that the plaintiff has claimed in this Suit the outstanding amount of Rs.19,230,400.00, but after deducting the amount of Rs.3,200,000.00 paid by the defendant after filing of this Suit, the outstanding amount now payable by the defendant is Rs.16,030,400.00. He prayed that the Suit may be decreed against the defendant in the sum of Rs.16,030,400.00 with the promised markup thereon at the rate of 17% per annum.

6. Summons were issued to the defendant several times through the District Judge Lahore, which remained unserved. Thereafter, summons were published on 27.03.2010 in the Urdu daily '*Jang*' (Lahore edition). In view of the said publication, service on the defendant was held good by the Additional Registrar (O.S.) on 13.05.2010. Since the defendant did not appear nor did he file his application for leave to appear and defend, the matter was ordered to be fixed for final disposal.

7. On my query about the territorial jurisdiction of this Court, the learned counsel for the plaintiff submitted that though the registered office of the defendant is at Lahore, the cause of action accrued time and again at Karachi, as the order for supply of coal was sent to the plaintiff at Karachi ; the entire quantity of coal was supplied / delivered by the plaintiff at Karachi ; the Sale Invoice was issued by the plaintiff at Karachi ; all the dishonoured cheques were received by the plaintiff at Karachi ; all the dishonoured cheques were drawn on the Karachi branch of Al-Baraka Islamic Bank ; and all the dishonoured cheques were presented and dishonoured at Karachi.

8. I have examined the documents filed by the plaintiff. The order placed by the defendant for supply of coal by the plaintiff contains relevant particulars, such as, the quantity of coal, the rate / sale consideration, and specification that it should be of Indonesian origin. The acknowledgment letter of the Clearing and Forwarding Agents was issued in order to confirm that the entire quantity of coal was supplied by the plaintiff on the dates and through the trucks mentioned therein. The Sale Invoice issued by the plaintiff in the name of the defendant is in conformity with the order placed by the defendant and delivery confirmation issued by the Clearing and

Forwarding Agents. A perusal of all the dishonoured cheques shows that the same bear the rubber stamp of the defendant with signatures thereon. It is also clear from a bare perusal of the said cheques that the same were presented several times, as “clearing” stamps of different dates are visible thereon. The ‘cheque return slips’ issued by the drawee bank in respect of the dishonoured cheques show that the cheques in question were dishonoured with the remarks “*not arranged for*”, which means that the defendant did not have sufficient funds in its account when the said cheques were presented by the plaintiff. The email dated 07.10.2009 addressed by the defendant to the plaintiff contains a specific promise by the defendant to settle its liability as per a schedule with specific dates mentioned therein. The letter dated 14.10.2009, addressed by the defendant to the plaintiff, contains a specific undertaking to pay markup to the plaintiff at the rate of 17% per annum on the outstanding amount till final settlement of the plaintiff’s claim.

9. All the aforementioned documents filed by the plaintiff and his claim based thereon have remained unchallenged and rebutted. An important aspect of this case, which cannot be ignored, is that the defendant never disputed the amount which the plaintiff claimed from him through emails, reminders and finally by a legal notice, and that the defendant did not make any attempt to pay to the plaintiff the amount of the dishonoured cheques. Not only does this clearly show that the liability is not disputed by the defendant, but also that it has no intention to settle its outstanding liability. Consequently, the plaintiff has successfully proved his case against the defendant which has remained unrebutted.

10. Under Order IX Rule 6(1)(a) CPC, an *ex parte* decree can be passed without recording evidence. However, it has been held in a number of cases by the Superior Courts that evidence of the plaintiff should be recorded even in cases where the defendant is being proceeded against *ex parte*. In respect of Suits under the Summary Chapter of the Code of Civil Procedure, it has been particularly held that recording of evidence is not necessary before passing an *ex parte* decree. Even otherwise, under Order XXXVII Rule 2(2) CPC, the allegations in the plaint are to be deemed to be admitted and the plaintiff becomes entitled to a decree when the defendant fails to appear and defend the Suit despite proper

service, or when he fails in obtaining leave to appear and defend the Suit. In this case, as the defendant has failed in obtaining leave to appear and defend the Suit, the contents of the plaint are to be deemed to be admitted and the plaintiff has become entitled to a decree.

11. Foregoing are the reasons of the short Order announced by me on 01.11.2012, whereby this Suit filed by the plaintiff was decreed with costs against the defendant in the sum of Rs.16,030,400.00 (Rupees sixteen million thirty thousand and four hundred only) with markup / profit thereon at the rate of 17% per annum with effect from September 2009 till realisation of the entire amount.

**J U D G E**

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